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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/576,060	08/28/2006	Ralf Dunkel	CS8772BCS033031	2152
3446/ 7590 02/26/2010 BAYER CROPSCIENCE LP Patent Department 2 T. W. ALEXANDER DRIVE RESEARCH TRIANGLE PARK, NC 27709				
EXAMINER				
FIERRO, ALICIA				
ART UNIT		PAPER NUMBER		
1626				
NOTIFICATION DATE		DELIVERY MODE		
02/26/2010		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/576,060

Applicant(s)

DUNKEL ET AL.

Examiner

Alicia L. Fierro

Art Unit

1626

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 16 February 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 19, 20, 23, 24, 28 and 29.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☒ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). 2/16/2010
13. ☐ Other: _____.

/Golam M. M. Shameem/
Primary Examiner, Art Unit 1626

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant's remarks presented in the after-final arguments regarding the 103 and double patenting rejections have been considered and entered into the record, but are not found persuasive.

Firstly, it is noted that the majority of Applicant's arguments have already been addressed and made of record in the final rejection mailed on 11/16/2009. Therefore, this action will address only the arguments which have not been previously addressed.

Applicant alleges that the Final Office action "fails to recognize that the court concluded only that the claims then at issue 'would have been expected to have similar properties to the structurally similar...compound'...and has improperly ignored the well established principle that even structurally similar inventions can be patentably distinct under certain circumstances." The Examiner disagrees with Applicant's assertions. Hydrogen and methyl are commonly substituted for one another in pesticidal compounds, including carboxanilides of the instant invention. For example, in the prior art compounds A can also be hydrogen or methyl, and in the instant application, the Markush group for R3 is disclosed to encompass both hydrogen and methyl. This provides evidence that in these particular compounds there is a reasonable expectation that although substituting a methyl for a hydrogen will increase the size and bulk of the compound, full functionality would be expected to be maintained. Further, to the assertion that the Examiner ignored the principle that similar inventions can be patentably distinct under some circumstances, the Examiner disagrees with this statement. It was clearly stated that absent unexpected results, the structurally similar compounds are held to be prima facie obvious. Therefore, a clear showing of unexpected results of the instant compounds over the prior art compounds could render the structurally similar compounds of the instant application patentably distinct over the prior art. However, no unexpected superiority is shown by the declaration for reasons already addressed in the Final Office action, namely that it would not be unexpected that compounds with different substitutions differ in their degree of efficacy as fungicides. Further, although the compounds compared in the declaration do fall within the scope of the desired claims as Applicants argue, they are not commensurate in scope and do not encompass the compounds relied on in the prior art to render obvious the instant compounds. Therefore, there is no evidence that the instant compounds are unexpectedly superior to those specific compounds relied upon in the prior art in the rejection.

With regard to Applicant's traversal of the double patenting rejection, Applicants state that they believe their claimed invention to be distinct from each patent but provide no specific remarks or arguments to support this contention. In the absence of additional remarks to the contrary or any Terminal Disclaimers, and further in light of the fact that this rejection is not the only rejection that remains, the rejections of the present claim over each of the cited pending application remains proper at this time.

The rejections are maintained for the reasons set forth above and those made previously of record.